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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of the Subscriber	)	
Carrier Selection Changes Provisions	)	CC Docket No. 94-129
of the Telecommunications Act of 1996	)	
Policies and Rules Concerning	)	
Unauthorized Changes of Consumers'	)	
Long Distance Carriers	)	

Comments of Time Warner Communications Holdings, Inc.

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SUMMARY

Time Warner Communications Holdings, Inc. ("TW Comm") applauds the Commission's efforts to stop carriers from switching a subscriber's preferred carrier without authorization - a practice referred to as "slamming". Slamming has become a prevalent problem in the market as competing carriers emerge and must be curbed in order to allow fair and balanced competition to flourish.

In prescribing its rules, the Commission must to take into account the ILEC's ability to take advantage of its market position in an anti-competitive manner. Specifically, the Commission must prohibit ILECs from sending promotional materials and verifications to subscribers when learning of a PC change request. This very practice undermines the solicitation efforts of the competing carrier and is contrary to a pro-competitive market place as envisioned by Congress. In addition, ILECs must be precluded from engaging in PC freezes. Under the guise of consumer protection, ILECs have been utilizing PC freezes to further secure their market dominance, at the detriment of competing carriers. Most importantly, the Commission's rules must advance a "level playing field" so that all telecommunications carriers can effectively compete.

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INTRODUCTION

Time Warner Communications Holdings, Inc.[1] ("TW Comm") hereby files its comments in response to the Federal Communications Commission's ("Commission" or "FCC") Further Notice of Proposed Rulemaking ("FNPRM")[2] implementing Section 258 of the Communications Act of 1934,[3] as amended by the Telecommunications Act of 1996 ("Act").[4] As a facilities-based

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[1] A wholly-owned subsidiary of the Time Warner Entertainment Company, L.P.

[2] In re Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996 Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, Further Notice of Proposed Rulemaking and Memorandum Opinion and Order on Reconsideration, CC Dkt. No. 94-129 (1997) (hereinafter referred as "FNPRM").

[3] 47 U.S.C.A. § 258 (West Supp. 1997).

[4] Pub. L. No. 104-104, 110 Stat. 56 (1996).

competitive local exchange carrier, TW Comm will be greatly affected by the outcome of this proceeding. In order to be able to compete fairly in a rapidly growing market, TW Comm and other competing carriers must be assured that the playing field is level and free from anticompetitive obstacles that would hinder emergence into the market. Slamming distorts the market by rewarding those companies who engage in deceptive and illegal marketing practices by unfairly increasing their customer base and revenues at the expense of those carriers that engage in legitimate marketing practices. To deter this type of activity, the Commission must establish rules that will create and enforce a system that penalizes these carriers. The only way to discourage and eventually eliminate this type of behavior is to impose substantial fines, as well as the threat of suspension or revocation of federal licenses, on carriers that engage in slamming.

I. Verification Procedures

A. Application of the Verification Rules Should Apply to All Telecommunications Carriers

The Commission seeks comment on the extension of its rules to all telecommunications carriers.[5] Section 258 of the Act states:

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[5] FNPRM at para. 11.

> No telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe. Nothing in this section shall preclude any State commission from enforcing such procedures with respect to intrastate services.[6]

The Act broadly defines a telecommunications carrier as any provider of telecommunications services. Telecommunications services is further defined as the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of facilities."[7]

The statutory language of Section 258 cleary grants the Commission authority to implement rules that will affect not only interstate carriers, but intrastate carriers as well. Although the Commission's statutory interpretation of its jurisdictional role as envisioned by Congress in other sections of the Act has been challenged effectively,[8] in this instance there is no doubt that Congress intended to grant the Commission

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[6] 47 U.S.C.A. § 258(a) (West Supp. 1997) (emphasis added).

[7] 47 U.S.C.A. § 153(46) (West Supp. 1997).

[8] In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, vacated in part, Iowa Utils. Bd. v. FCC, No. 96-3321 (8th Cir. 1997).

jurisdiction to promulgate rules governing both local exchange and interexchange carriers. Therefore based on this interpretation of Section 258, TW Comm agrees with the Commission's proposal to extend the scope of its verification rules to all telecommunications carriers.

B. Definition of "Submitting" and "Executing" Carrier Encompasses All Carriers

TW Comm agrees with the Commission's proposed definitions for "submitting" and "executing" carriers.[9] These definitions are sufficiently broad in scope so as to hold accountable all carriers that may be involved in preferred carrier ("PC") changes. TW Comm cannot contemplate a situation whereby a carrier involved in a PC change does not fit into the definition of either a submitting or executing carrier.

C. ILECs Should be Precluded From Sending Promotional Letters and Verifications to Subscribers that Make a Carrier Selection Change

The Commission must prescribe rules that will prohibit incumbent local exchange carriers ("ILECs") from sending promotional letters and verification material to consumers that have made a decision to switch carriers.

In most cases, ILECs will be responsible for executing PC change requests, requiring the ILEC to act as a neutral party.

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[9] FNPRM at paras. 13-14.

However, as the FNPRM notes, a PC change request made by an ILEC's customer may motivate the ILEC to engage in conduct that blurs the distinction between its role as executing carrier and its objectives as a dominant market competitor.[10] To avoid losing customers the ILEC may engage in the practice of sending promotional letters that offer incentives such as discounts or special premiums to persuade the subscriber not to switch carriers. ILECs may also, under the guise of verifying the subscriber's request, send material that has the effect of persuading the subscriber not to switch carriers. As executing carrier, the ILEC has the opportunity to counter the competitor's marketing efforts, an opportunity that the competitor does not have. Moreover, most competitive carriers do not have the additional resources to re-solicit those subscribers that have received such promotional letters or verification materials from the ILEC. This is exactly the type of anticompetitive behavior that the Act aims to abolish. Accordingly, the Commission's verification procedures must preclude ILECs from sending to the subscriber any additional documents or information once the PC change request has been made by the subscriber.

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[10] Id. at para. 15.

D. Verification of In-Bound Calls Will Deter Possible Abuses

TW Comm agrees with the Commission's proposal to extend its verification procedures to all in-bound calls made by a subscriber to a carrier's sales or marketing office.[11] Requiring the carrier to comply with the Commission's verification rules when in-bound calls are received does not create any additional burdens on the carrier. Consumers who initially place calls to a carrier's business number, presumably searching for information, should receive the same benefit from rules designed to deter deceptive practices that consumers receive when a PC change is the result of an out-bound telemarketing call. There is no difference between these two situations to justify such disparate treatment.

In addition, extending the verification procedures to in-bound calls will have the effect of deterring potential abuses. As the Commission points out in the FNPRM, carriers that offer various telecommunications services may be motivated to take advantage of the in-bound caller and switch the customer to other services offered by the carrier without the caller's

[11] Id. at para. 19.

consent.[12] Moreover, if the Commission's verification rules do not extend to in-bound calls, carriers may attempt to defend their slamming activities by claiming that the execution of the subscriber's carrier selection change was the result of an in-bound call. Extending the Commission's verification procedures to in-bound calls will protect subscribers from deceptive practices and will support a neutrally competitive market.

E. Preferred Carrier Freezes Negatively Affect Competition and Should Be Prohibited

The FNPRM seeks comment on whether the Commission's verification procedures should extend to PC freeze solicitations and how the Commission should balance the benefit of providing adequate consumer protection with the threat of possible market abuse.[13] As the FNPRM recognizes, the practice of soliciting PC freezes by the ILEC has a negative impact on the ability of competing providers to secure new customers. In certain markets, PC freezes are being utilized by the ILEC, under the guise of consumer protection, as a tool to secure its customer base and market dominance. ILECs market PC freezes to their customers as a protection against unauthorized conversions of its preferred carrier. However, far too often the marketing materials fail to

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[12] Id.

[13] Id. at paras. 22- 24.

explain to the subscriber that if it chooses to change its carrier selection, presumably as a result of a telemarketing call or an in-bound call, the PC freeze will prohibit the selected carrier from executing the request. Not only is this practice deceptive and intrusive, in that it restricts the subscriber's ability to make a choice as to its carrier selection, it also has the anticompetitive effect of "freezing" in place the ILEC's customer base and shielding it from competition.[14]

The threat of this type of anticompetitive behavior is prevalent in the market place today. Just four days before comments were due in this proceeding, Ameritech was ordered by the Public Utilities Commission of Ohio ("PUCO") to change its "Prohibit PIC Change" program so as to allow competitors a fair opportunity to compete for customers.[15] The PUCO found that the information contained in Ameritech's bill inserts encouraging customers to sign up for the program was misleading and inaccurate because it lead customers to believe that the PC

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[14] It is interesting to note that the ILECs have only recently introduced PC freeze options as the threat of competition becomes more prevalent. This is further evidence of the ILECs' attempt to protect its market position from emerging competition.

[15] In the Matter of Sprint Communications Co., LP v. Ameritech Ohio, Case No. 96-142-TP-CSS (Sept. 11, 1997) (hereinafter referred to as "PUCO Order") (See Attached Press Release).

freeze prevented unauthorized changes to their interLATA service, when in fact the freeze also applied to the customer's intraLATA and local exchange service. Ameritech was sanctioned for promoting a program that had the effect of protecting its monopoly over local and intraLATA toll service, while at the same time offering customers protection from slamming.[16] The PUCO stated:

> We are very concerned that competition develop in a fair and balanced manner. The dissemination of less than accurate information is not an acceptable marketing strategy. Nor is the use of bottleneck facilities for the establishment of unreasonable hurdles that competitors must overcome acceptable.[17]

It is evident that ILECs are exploiting their market dominance to protect themselves from emerging competition by impeding the ability of subscribers to make PC changes. This very practice contravenes the principal goal of the Act - to provide for a pro-competitive market place - by creating

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[16] The Illinois Commerce Commission and the Michigan Public Service Commission also found that Ameritech's bill insert was misleading because it failed to clearly inform customers that the PC freeze would apply to all services, not just interLATA service. See MCI Telecommunications et al v. Illinois Bell Telephone Company, ICC Docket Nos. 96-0075 and 96-0084 (April 3, 1996); aff'd and rev'd in part, Illinois Bell Telephone Company v. Illinois Commerce Commission, Case Nos. 1-96-2146, 1-96-2166, (1st Jud. Dist. Sept. 5, 1997); In the Matter of the Complaint of Sprint Communications Company, L.P. Against Ameritech Michigan; Case No. U-11038 (Aug. 1, 1996).

[17] PUCO Order at 29.

unreasonable hurdles for the development of fair and effective competition. Accordingly, the Commission must prohibit the solicitation and execution of PC freezes.

If the Commission allows PC freezes to continue, at a minimum its rules must provide guidelines that ensure that marketing materials used in the solicitation of a PC freeze contain competitively neutral language that does not portray a market replete with "bad players" nor enhance the competitive position of the incumbent. In addition, the marketing materials must fully disclose whether the PC freeze affects the subscriber's local or long distance services or both. The solicitation must also set forth the procedures for canceling the freeze, which should include information that fully and clearly delineates the actions the subscriber must take to effect a PC change. For fair competition to flourish, consumers must have clear and unambiguous information about the actions and choices they are asked to make.

ILECs may suggest that restrictive rules are not necessary because a competing carrier can seek reparation through a Section 208 complaint proceeding if the PC freeze negatively affects its ability to compete. However, it would be quite difficult for an emerging competitor to calculate and substantiate the amount or percentage of potential customers lost

due to the PC freeze. The Commission must recognize and address the fact that competing carriers do not have any effective recourse against an ILEC's imposition of a PC freeze.

II. Liability of Authorized and Unauthorized Carriers

A. Unauthorized Carriers Must be Held Liable to Properly Authorized Carriers

Section 258(b) of the Act clearly sets forth Congress's express intent to require that carriers violating the Commission's verification rules submit to the properly authorized carrier all charges collected from the subscriber. There is no doubt that Section 258(b) serves as an assurance that unauthorized carriers not be permitted to receive economic gain from illegally switching a subscriber's preferred carrier and that the authorized carrier is not deprived of foregone revenue. The legislative history of the Act clearly supports the view that carriers violating the Commission's verification procedures "must reimburse the original carrier for forgone revenues . . ."[18] Thus, in addition to requiring unauthorized carriers to submit all collected charges to the authorized carrier, the unauthorized carrier should also be required to pay the difference between the charges collected from the subscriber and the amount the

[18] Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., 136 (1996).

authorized carrier would have received from the subscriber had the subscriber not been slammed. For instance, if the unauthorized carrier's rates are less than the authorized carrier, it may collect an amount from the subscriber that is much less than the amount the authorized carrier would have collected from the customer. Requiring carriers to make the authorized carrier "whole," as if the slamming never occurred, further penalizes carriers for slamming customers and provides a greater deterrence to this uncompetitive practice.[19]

To the extent that the unauthorized carrier's rates are more than the authorized carrier, the unauthorized carrier should be required to pay to the authorized carrier all the funds collected from the subscriber and the value of any additional premiums so as to make the carrier "whole".

B. The Authorized Carrier Should be Held Liable to the Subscriber

In prescribing its rules, the Commission must ensure that they serve to eliminate anticompetitive behavior and penalize those carriers that engage in such behavior. The Commission must also recognize that of the three parties involved in a slamming incident, the customer is the victim. With this in

[19] TW Comm encourages the Commission to consider imposing substantial fines on carriers that continuously violate its verification rules.

mind, the Commission's rules must guarantee that the customer is "made whole" as if the unauthorized PC change never occurred. Making the customer "whole" includes the restoration of any premiums the customer would have received had it not been slammed.

The subscriber should be reimbursed or credited by the authorized carrier for any payments made to the unauthorized carrier that exceed the payments it would have made to the original carrier. Once the authorized carrier has been "made whole" by the unauthorized carrier, it should provide the subscriber with either a credit on its bill or a check reflecting the amount of the over payment. As for premiums owed the customer, the authorized carrier offering the premiums should reimburse the customer, since once the authorized carrier is "made whole" it should be fully able to comply with its agreement to provide the premium. If for some reason the premium cannot be given - i.e., there are no premiums left to give - the authorized carrier must give the customer the value of the premium in either a credit or reimbursement or provide another agreed upon premium.

In order to be able to provide customers with premiums they would have received from the authorized carrier had slamming not occurred, the authorized carrier must be able to receive from the unauthorized carrier the monetary value of the premium. The

underlying inference should be that the unauthorized carrier takes customers as it finds them; therefore, it should be held liable to the properly authorized carrier for all premiums owed the customer.

C. Dispute Resolution

TW Comm agrees with the Commission's proposal to allow disputes between carriers to be privately settled.[20] Not until private negotiations have been initiated and failed should the carriers be permitted to seek resolution from the Commission. To allow otherwise would unnecessarily burden the Commission and would be inconsistent with the deregulatory goals of the Act.

D. Third Parties Should Not be Used to Execute PC Changes

The Commission seeks comment on the use of an independent third party to execute PC changes in order to reduce carrier disputes.[21] This alternative should not be instituted for several reasons. First, additional costs will be incurred by placing the responsibility of executing changes on a third party. These administrative costs will be borne by all telecommunications carriers, thus adding to the cost of providing service. Secondly, adding a third party component to the

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[20] FNPRM at para. 31.

[21] Id. at 35.

transaction of changing a subscriber's carrier will only create unnecessary administrative delays in the execution of the change. Most newly selected carriers will want to effectuate the PC change immediately. However, this may not be possible when the customer's request for a PC change has to be relayed to a third party before it can be executed. It simply is not economically or administratively efficient to introduce a neutral third party to administer and execute the subscriber's PC change request.

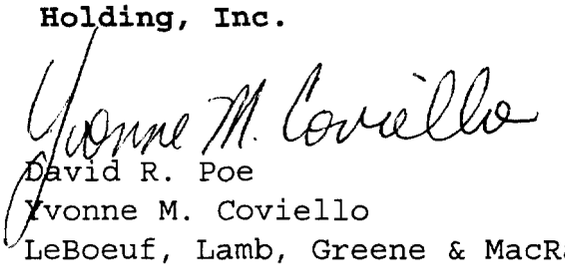
However, as stated above, the Commission's rules must prohibit the executing carrier, usually the ILEC, from engaging in anticompetitive practices, such as sending verifications and promotional letters to switching subscribers or by delaying a subscriber's PC change request.

CONCLUSION

As described herein, TW Comm supports the Commission's efforts to promulgate rules to deter and eventually eliminate the unauthorized switching of a subscriber's carrier selection.

Respectfully submitted,

Time Warner Communications Holding, Inc.

By: 

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PUCO PRESERVES AMERITECH SLAMMING PROTECTION FOR CUSTOMERS

COLUMBUS, OH -- The Public Utilities Commission of Ohio (PUCO) today ruled that Ameritech Ohio may continue to offer its provider "slamming" protection program to its customers.

In addition, the PUCO ordered Ameritech to make several changes to its "Prohibit PIC Change" program to allow competitors a fair opportunity to compete for those customers.

The PUCO order stems from a December 1995 mailing by Ameritech to its 2.6 million local telephone service customers. The mailing, according to the PUCO, did not fully inform customers that the protection applied to their entire local service account.

The Commission ruled that Ameritech had designed the customer form not only to extend protection to customers from having their interLATA long-distance service carrier switched - or "slammed" - without the customers' authorization, but also to protect its monopoly over local and intraLATA toll service.

Long distance companies carry telephone traffic across Local Access Transport Area (LATA) boundaries while local companies, such as Ameritech, carry most all calls within a LATA boundary, including short-haul toll traffic. A frequent complaint by telephone customers to PUCO's toll-free consumer hotline (1-800-686-7826) is that they were switched, or "slammed" to another long-distance carrier without the customers' permission.

Ameritech marketed the program as PPC - "Prohibit PIC Change." PIC is a term used in the telecommunications industry to denote primary interexchange carrier - a customer's long distance company.

The Commission concluded that the program created unreasonable hurdles for the development of a fair and effective competitive local and intraLATA long distance market in Ohio.

To help ensure a continued competitive environment in local exchange telecommunications services and as part of its ongoing consumer protection role, the PUCO ordered Ameritech, within 120 days, to:

*** unbundle its "Prohibit PIC Change" program so that customers
can request the service for any combination of interLATA,
intraLATA and local exchange services.

*** apply its "Prohibit PIC Change" promotion only to interLATA
long distance service until the customer affirmatively selects
such protection when competition actually begins in the local
and intraLATA long distance markets.

*** notify all customers who had previously selected its slamming

protection option that the service applies only to interLATA calls. Notification is to be accomplished with a bill insert approved by the PUCO's Consumer Services Department.

*** work with other carriers that want to offer the same type of slamming to its customers when Ameritech controls the switch.

*** allow conference calls during normal business hours between a customer, a carrier and Ameritech to make a change in providers.

*** refrain from attempting to win back a customer during the process of changing a customer's service.

The December 1995 Ameritech bill insert, if signed by a customer, could be used by Ameritech not only to help its customer maintain the long distance carrier of his or her choice but also could be used by Ameritech to make it far more difficult for a competitor to sign up any current Ameritech customer for local service.

The Ameritech bill insert invited customers to sign an authorization form or call a special toll-free number "to ensure that slamming never happens to you. Upon receipt, Ameritech will not permit any changes to your account unless you notify us by phone or in writing of your desire to make changes."

The Ameritech bill insert promised customers that by signing the form they would be protected against slamming or any change in providers of "other telecommunications service."

On February 13, 1996 - two months after the Ameritech mass mailing - Sprint Communications Company filed a complaint with the Commission alleging that Ameritech's "Don't Get Slammed!" bill insert was misleading. Public hearings were held June 27, 1996 and July 16, 1996.